

In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

AMERICAN PIPE AND CONSTRUCTION CO.,

Petitioner

vs.

HONORABLE MARTIN PENCE, Chief United
States District Judge, District of Hawaii,

Respondent

and

THE STATE OF CALIFORNIA, et al.,

Real Parties in Interest.

PETITIONER'S BRIEF IN RESPONSE TO THE
BRIEF OF THE TRIAL JUDGE

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vs.

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PETITIONER'S BRIEF IN RESPONSE TO THE
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The motion for leave to file and the respondent's
brief 3/ are noteworthy in several particulars. It would

1/ By order of this Court filed March 12, 1968, appellant American Pipe and Construction Co. was redesignated "petitioner" appellees were redesignated "real parties in interest" and the trial court, having suggested that he may be an indispensable party, was designated "respondent."

2/ Ibid.

3/ Ibid.

appear that, in his desire to make certain that his order would be supported in this Court, Judge Pence has assumed the role of an advocate and as a result, consciously or unconsciously, may have lost the requisite air of detached impartiality with regard to the issues involved in this proceeding. Judge Pence's brief conclusively establishes that there is no substantive difference between Pre-Trial Order No. 15 and Pre-Trial Order No. 14 -- they both provide for three concurrent trials (R. Br. p. 4).^{4/} Judge Pence's brief demonstrates that (contrary to the position of plaintiffs, the real parties in interest) these cases were in fact channeled to Judge Pence by the Chief Judge of this Court for all further proceedings therein (R. Br. pp. 15-16).

I. JUDGE PENCE'S EXPLANATION AND PURPORTED JUSTIFICATION OF THE ORDER REQUIRING THREE TRIALS AT ONCE

When petitioner consented to the filing of an amicus curiae brief, it assumed that the brief would follow the teaching of Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir. 1965). Petitioner's motion for leave to file a petition for mandamus in No. 22336 specifically stated "To avoid the result which occurred in Rapp v. Van Dusen . . . counsel for

^{4/} References to the respondent's brief are stated: "R. br. p. ____" and references to the accompanying motion are stated "R. mot. p. ____."

petitioner herein have requested the above named Court to follow the procedure adopted by the Third Circuit so that respondent here will be deemed a nominal party only, and plaintiffs, the prevailing parties in the challenged decision, will be deemed to be respondents . . ." Despite this, Judge Pence's moving papers assert that he may be an indispensable party and should be permitted to contest petitioner's position (R. mot. pp. 4-5). As the court stated in Rapp (350 F.2d at 813)

"It is appropriate that his [the trial court's] original opinion be considered as his answer to the contentions of the petition and if no opinion already appears of record, or if he desires to supplement his opinion, he may file in the mandamus proceeding in this court a memorandum in support and explanation of his challenged action."

Such a procedure was devised to avoid getting the trial court "entangled as an active party to litigation", Ibid. p. 813. In the circumstances petitioner has no alternative but to respond to the arguments advanced in respondent's brief. ^{5/}

5/ As to the charge by the author of Judge Pence's brief that petitioner's counsel have "deliberately misled this Court" (R. br. p. 12) and the suggestions that petitioner has made "silly" or "fanciful" arguments in disregard of the record (R. br. pp. 19, 21), petitioner has made every attempt to state its case with candor and honesty and believes the record speaks for itself.

Judge Pence's brief asserts that the sole question presented by this appeal is the authority of a trial court "to control his own calendar and set ready actions for trial" (R. br. p. 9). More precisely, the issue is the authority of Judge Pence to control and coordinate the calendars of several judges to make certain that three cases go to trial at the same time in the absence of a compelling reason therefor.

Petitioner is taken to task for not using any modifying terms in connection with the word "simultaneous" to indicate that the three trials would not begin on the same minute of the same hour of the same day. Webster defines "simultaneous" as meaning "at the same time" and no amount of quarreling over terminology will disguise the fact that the order will needlessly require three trials at the same time.^{6/}

We are told that novel problems of judicial administration require the courts and counsel to be extentionalists. Adaptation to change is commendable - but we must make certain that judicial short-cuts do not impinge on the basic rights of the litigants. In other words, zeal for the administration of justice cannot be permitted to interfere with justice itself.

^{6/} Judge Pence's brief (p. 14) estimates that each case will last 60 days. If this is correct, the first and second trial would be conducted simultaneously for about six weeks and all three would be going on simultaneously for approximately four weeks.

one time to avoid prejudicing the plaintiffs (R. br. p. 14). We have no quarrel with the basic premise that both sides are entitled to as "just, speedy and inexpensive determination of every action" as possible under the circumstances (Rule 1, F.R.C.P.). But, contrary to the inferences contained in Judge Pence's brief, any delay which might result from an orthodox trial plan is hardly of petitioner's making. While his brief indicates that the core of the problem is that one of the parties is insisting on a jury trial, respondent neglects to point out that it is the plaintiffs', not the petitioner's, insistence which forms that core. It does not follow from this that some system or any system must be devised to avoid making the real parties in interest wait their turn for a jury trial, just as plaintiffs all over the country do. What does follow is that some trial plan must be devised which will minimize the chance of denial of the fundamental right to a fair trial, a right far superior on any scale of values to any "right" to a speedy jury trial.

We are advised that 27 separate, orthodox and seriatim trials before a single judge is out of the question because of the interminable length of time which would be required therefor. Petitioner has never urged such a "solution." We are informed that a single, equitable jury trial is out of the question because there are too many plaintiffs and too many transactions (R. br. p. 16). Who, may we ask, runs the risk of being prejudiced by a single consolidated trial? Certainly not the real parties in

together in a champertous joint venture under which they have all agreed to share in any amount realized from any of their various claims. So also, plaintiffs lately assert damage flowing from a single alleged conspiracy. Their claims differ only in the amount sought. On the other hand, petitioner (while denying participation in any conspiracy) asserts that the most that plaintiffs can hope to prove is that there were different conspiracies which affected different products in different areas at varying times. Thus, it is petitioner who would run the risk and -- to avoid having to undergo concurrent trials -- it is willing to accept the risk.

Assuming, arguendo, that because of the jury demand of the real parties in interest, a single consolidated trial is out of the question, does this mean that simultaneous trials are reasonable or even necessary? Judge Pence's brief ducks this question. Every trial plan ever proposed below contemplated some type of consolidation. The Judge's brief unnecessarily presupposes that five or six consolidated cases would have to be tried by the same judge (R. br. p. 16). If Judge Pence has the authority to consolidate and assign some of these cases to Judges Boldt and Zirpoli, why does he not do so with no strings attached? What is the reason for respondent's insistence that the other judges must carefully arrange their dockets to make certain that the trials will run concurrently with the one being conducted

One thing is certain -- if some of the cases were merely assigned to other judges and if each controlled his own calendar, there is a real probability that some reasonable plan would be devised which would not require counsel and the parties to proceed on three fronts at once. Such a procedure is a pragmatic answer which could avoid the prejudice inherent in the other plan. Yet it is not discussed or considered. Why?

II. THE NEW ORDER WOULD CAUSE THE SAME DIRE CONSEQUENCES AS THE OLD ORDER

Faced with the belated concession of the real parties in interest that the challenged order would work a hardship upon them, respondent's brief does not come to grips with the inequities and prejudice to petitioner. It is inferentially conceded (R. br. p. 18) that prejudice would flow from "literally simultaneous" trials, but would somehow evaporate if an "overlap" approach were devised.^{7/} It is suggested that petitioner even now should have faith in trial judges and hope that by telephonic consultation

^{7/} The potential areas of prejudice which petitioner set forth in its Opening Brief were predicated upon an order which both respondent and the real parties in interest concede is substantively the same as the new order.

they can and will overcome the detriments inherent in such an arrangement. Everyone but petitioner ignores the possibility of trying to eliminate the handicaps which are present only in deliberately planned simultaneous trials.

There are said to be benefits which could flow from the order -- briefing time with witnesses might be reduced and their testimony should be consistent. It is perhaps true that briefing time would be reduced -- it might even be eliminated because there would be no real opportunity to prepare witnesses as they shuttle from city to city up and down the length of the West Coast. Petitioner desires a more orthodox approach to the presentation of evidence -- especially that of the expert witnesses whose detailed testimony perforce must be directed to particular claims of damage. They cannot be prepared like trained seals with a single script which can be used in all the cases.

CONCLUSION

One cannot read Judge Pence's brief without wondering why it is so all fired important to subject petitioner to three trials at once. We suggested the possibility that the order was a weapon which, under the guise of judicial administration, was designed to force petitioner to settle these cases for an exhorbitant amount. After reading Judge Pence's brief we have no reason to alter our conclusion in this regard. If anything, his advocacy of the position of plaintiffs, the real parties in interest, serves to underscore the need for corrective action from this Court. In view of the importance of the questions presented, petitioner joins respondent in his request for oral argument.

Respectfully submitted,

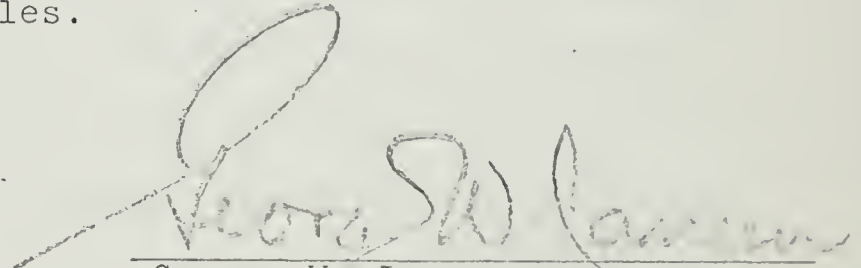
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Dated: March 19, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.


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Santa Ana Mountains County
Water District
Santiago County Water District
Serrano Irrigation District
Talbert Water District
Tri-Cities Municipal Water District
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Los Angeles County Waterworks
District No. 4
Los Angeles County Waterworks
District No. 22
Los Angeles County Waterworks
District No. 29

All plaintiffs except United
States Government and
Washington Public Power
Supply System

Ashland, City of
Clackamas County
Clackamas Water District
Coos Bay, City of
Corvallis, City of
Eugene, City of
Forest Grove, City of
Hillsboro, City of
Hood River, City of
Lincoln City, City of
McMinnville, City of
Medford, City of
North Bend, City of
Oregon, State of
Portland, City of
Ranier, City of
Rockwood Water District
Salem, City of
West Slope Water District
Wolf Creek Highway Water District
Brownsville, City of
Dalles City, City of
Gladstone, City of
Molalla, City of
Newberg, City of
Silverton, City of
Multnomah County
Holcomb Outlook Water District
Oak Lodge Sanitary District
Portland, Port of
South Suburban Sanitary District

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Cities Sanitation District

North Coast County Water District
Purissima Hills County Water
District

Westborough County Water District

Alameda, City of
Alameda County Flood Control and
Water Conservation District

Alhambra, City of

Anaheim, City of

Anderson-Cottonwood Irrigation
District

Antioch, City of

Azusa, City of

Bakersfield, City of

Barstow, City of

Belmont County Water District

Benecia, City of

Berkeley, City of

Beverly Hills, City of

Big Bear Lake Sanitation District
of San Bernardino County

Brea, City of

Buena Park, City of

Buena Sanitation District

Burbank, City of

Burlingame, City of

Calleguas Municipal Water District

Cardiff Sanitation District

Carlsbad, City of

Carmichael Irrigation District

Central California Irrigation District

Central Contra Costs Irrigation
District

Citrus Heights Irrigation District

Coachella Valley County Water
District

Colton, City of

Compton, City of

Contra Costa, County of

Contra Costa County Storm Drain
District

Contra Costa County Water District
Cucamonga County Water District
Davis, City of
Delano-Earlimart Irrigation
District
Eastern Municipal Water District
East Niles Community Services
District
El Dorado Hills County Water
District
El Segundo, City of
Elsinore Valley Municipal Water
District
Escalon, City of
Escondido, City of
Estero Municipal Improvement
District
Eureka, City of
Exeter Irrigation District
Fair Oaks Irrigation District
Fallbrook Public Utility District
Fountain Valley, City of
Freedom County Sanitation District
Fresno, City of
Fullerton, City of
Garden Grove, City of
Gilroy, City of
Glendale, City of
Hawthorne, City of
Hayward, City of
Huntington Beach, City of
Huntington Park, City of
Inglewood, City of
Ivanhoe Irrigation District
La Canada Irrigation District
Laguna Beach, City of
Laguna Beach County Water District
LakeArrowhead Sanitation District
of San Bernardino County
Lake Hemet Municipal Water District
Lakewood, City of
La Mesa, City of
La Presa County Water District
Las Virgenes Municipal Water
District
Lindmore Irrigation District
Lindsay-Strathmore Irrigation
District
Littlerock Creek Irrigation District
Los Altos, City of
Lower Tule River Irrigation District
Manhattan Beach, City of
Marin Municipal Water District

Merced, City of
Modesto, City of
Monrovia, City of
Morgan Hill, City of
Mountain View, City of
Nevada Irrigation District
Newport Beach, City of
North Marin County Water District
Northridge Park County Water
District
Oakdale Irrigation District
Oakland, City of
Oakley County Water District
Oceanside, City of
Olivenhain Municipal Water
District
Ontario, City of
Orange, City of
Orange County, County Sanitation
District No. 1 of
Orange County, County Sanitation
District No. 2 of
Orange County, County Sanitation
District No. 3 of
Orange County, County Sanitation
District No. 5 of
Orange County, County Sanitation
District No. 6 of
Orange County, County Sanitation
District No. 7 of
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Oroville-Wyandotte Irrigation
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San Jose, City of
San Leandro, City of
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San Luis Water District
San Marcos County Water District
San Mateo, City of
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Santa Maria, City of
Santa Monica, City of
Santa Rosa, City of
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Conservation District
Saucelito Irrigation District
Seal Beach, City of
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District
South Park County Sanitation
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South San Joaquin Irrigation
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South Sutter Water District
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Upland, City of
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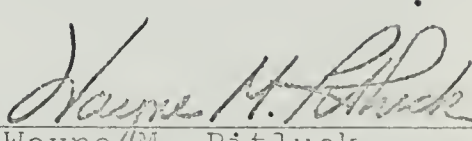
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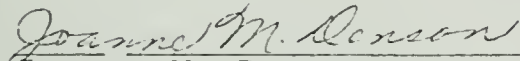
and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office mail box at San Diego, California.

Executed on March 19, 1968, at San Diego, California.



Wayne M. Pitluck

Subscribed and sworn to before me
this 19th day of March, 1968.



Joanne M. Denson
Notary Public in and for
said County and State.

